Perdana Cigna Insurance Bhd v Kalsom bt Mat Abu (as legitimate mother and next friend of deceased)

HIGH COURT (TAIPING) — CIVIL APPEAL NO 11–21 OF 2001
ZAKARIA SAM J
14 OCTOBER 2008

Evidence — Burden of proof — Insurance — Motor accident claim — Whether vehicle insured at material time — Cover note — Cover note was never issued by appellant — Whether insurer ought to check and investigate whether cover note was false or otherwise — Whether respondent to prove validity — Whether established — Evidence Act 1950 ss 90A, 103, 106

Insurance — Cover note — Validity of — Cover note was never issued by appellant — Whether JPJ ought to verify validity of cover note received before issuing road tax — Road Transport Act 1987 s 91(4)

Insurance — Motor insurance — Liability — Respondent failed to produce cover note or certificate of insurance — Whether appellant liable

The suit herein was the result of an accident involving a motorvan and motorcycle, which happened on 3 November 1996, where the rider of the said motorcycle died in the accident. The respondent/plaintiff, the mother of the deceased, instituted proceedings against the owner and driver of the said motorvan in the magistrate's court. Prior to the filing of the first action, the respondent's solicitors obtained a letter from the Jabatan Pengangkutan Jalan, Pulau Pinang ('JPJ') which revealed that the Insurance Company of North America (predecessor of the appellant company) was alleged to have issued a Cover Note No 11495 in respect of the said motorvan for the period of 17 August 1996 to 16 August 1997. The appellant however, denied being the insurer of the said motorvan at the material times, as the cover note presented to the JPJ contained five digit numbers whereas the appellant's official cover note had only four digits. As the appellant took the stand that they had no liability to meet vis-a-vis the respondent, the appellant did not attend the first action in Parit Buntar Magistrate's Court and accordingly, a judgment in default of appearance was recorded against the appellant. On 26 March 1999, the respondent filed a recovery action (the second action) in the Parit Buntar Magistrate's Court. The appellant filed a defence resisting the second action. The learned magistrate upon hearing the second action, allowed the

respondent's claims. This was the appeal by the appellant in respect of the second action.

Held, allowing the appeal with costs:

(1) A contract of insurance was completed when the proposal was accepted by the insurance company to whom it was made and such acceptance would be communicated to the proposer (ie, the owner). Exhibit P5 showed the period of insurance coverage ie, from 17 August 1996 to 16 August 1997. The accident occurred only on 3 November 1996 and until then, the appellant had not received any proposal form or premium or had knowledge of the alleged cover note. Exhibit P5 merely revealed the particulars of the insurance company according to the unverified record of JPJ that the cover note was issued by the appellant. The burden was on the respondent to prove the validity of the cover note. More so, the cover note was only valid for one month, where it would be replaced by a certificate of insurance (see paras 24–26).

(2) The words 'delivered to the person by whom a policy has been effected' under s 91(4) of the Road Transport Act 1987 means, delivered to the owner of the motor vehicle. Therefore, it was for the respondent to call the owner of the said motorvan as a witness to prove that a certificate of insurance had been delivered to him (see para 29).

(3) The respondent had failed: (i) to produce the cover note or the certificate of insurance; (ii) to call the insured of the said motorvan to prove that he had purchased the insurance; (iii) to produce the receipt of payment for the premium; and (iv) to produce the proposal form (see para 34).

[Bahasa Malaysia summary

Guaman ini adalah disebabkan oleh satu kemalangan yang melibatkan sebuah van dan motorsikal yang berlaku pada 3 Januari 1996 di mana penunggang motorsikal tersebut mati di dalam kemalangan tersebut. Responden/plaintif, adalah ibu kepada si mati, memulakan prosiding terhadap pemilik dan pemandu van tersebut di mahkamah majistret. Sebelum pemfailan tindakan pertama, peguam responden telah mendapatkan surat daripada Jabatan Pengangkutan Jalan, Pulau Pinang ('JPJ') yang mendedahkan bahawa Syarikat Insurans North America (syarikat perayu terdahulu) didakwa telah mengeluarkan Nota Lindung No 11495 berkenaan dengan van tersebut untuk tempoh 17 Ogos 1996 hingga 16 Ogos 1997. Walau bagaimanapun, perayu menafikan menjadi syarikat insurans van tersebut pada masa yang material, yang mana nota lindung yang dikemukakan kepada JPJ mengandungi lima digit manakala nota lindung

perayu yang rasmi hanya ada empat digit. Oleh kerana perayu mengambil keputusan bahawa mereka tidak bertanggungan untuk dipenuhi dalam hubungannya dengan responden, perayu tidak menghadiri tindakan pertama di Mahkamah Majistret Parit Buntar dan mewajarkan satu penghakiman ingkar kehadiran direkodkan terhadap perayu. Pada 26 Mac 1999, responden telah memfailkan satu tindakan untuk mendapatkan semula (tindakan kedua) di Mahkamah Majistret Parit Buntar. Perayu telah memfailkan pembelaan menentang tindakan kedua. Majistret yang bijaksana apabila mendengar tindakan kedua, telah membenarkan tuntutan responden. Ini adalah rayuan oleh perayu berkenaan dengan tindakan kedua.

Diputuskan, membenarkan rayuan dengan kos:

(1) Kontrak insurans adalah lengkap apabila cadangan telah diterima oleh syarikat insurans kepada siapa ianya telah dibuat dan penerimaan tersebut mestilah berhubungan dengan pencadang (iaitu, pemilik). Ekshibit P5 menunjukkan tempoh perlindungan insurans iaitu, daripada 17 Ogos 1996 hingga 16 Ogos 1997. Kemalangan telah berlaku hanya pada 3 November 1996 dan sehingga sekarang, perayu tidak menerima mana-mana borang cadangan atau premium atau mempunyai pengetahuan berkenaan dengan nota lindung yang didakwa. Ekshibit P5 hanya mendedahkan butiran syarikat insurans menurut rekod JPJ yang tidak disahkan bahawa nota lindung telah dikeluarkan oleh perayu. Beban adalah ke atas responden untuk membuktikan kesahan nota lindung tersebut. Selanjutnya, nota lindung hanya sah untuk sebulan, yang mana ianya perlu diganti dengan sijil insurans (lihat perenggan 24–26).

(2) Ayat 'penanggung insurans menyerahkan kepada orang yang melaksanakan polisi itu' di bawah s 91(4) Akta Pengangkutan Jalan 1987 bermaksud, diserahkan kepada pemilik kenderaan. Oleh itu, adalah tugas responden untuk memanggil pemilik motorvan sebagai saksi untuk membuktikan bahawa sijil insurans telah disampaikan kepadanya (lihat perenggan 29).

(3) Responden telah gagal: (i) untuk mengemukakan nota lindung atau sijil insurans; (ii) untuk memanggil pengambil insurans van tersebut untuk membuktikan bahawa dia telah membeli insurans tersebut; (iii) untuk mengemukakan resit pembayaran bagi premium tersebut; dan (iv) untuk mengemukakan borang cadangan (lihat perenggan 34).]

Notes

For cases on cover note generally, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 65–66.

For cases on insurance, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 503–505.

For cases on liability, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 312–315.

Cases referred to

Asiah bt Abdul Manap & Anor v Capital Insurance Bhd [1998] 4 MLJ 361, FC (refd)

Badruzamani bin Azmi v Kurnia Insurance (M) Bhd [2001] 6 MLJ 481; [2001] 4 AMR 4040, HC (refd)

Capital Insurance Bhd v Kasim bin Mohd Ali [1996] 2 MLJ 425, CA (refd)

Capital Insurance Bhd v Kasim bin Mohd Ali [2000] 1 MLJ 193; [2000] 1 CLJ 269, CA (refd)

Carpenter v Ebblewhite [1939] 1 KB 347, CA (refd)

Harker v Caledonian Insurance [1979] 2 Lloyd's Rep 193 (refd)

Malaysian National Insurance Sdn Bhd v Lim Tiok [1997] 2 MLJ 165; [1997] 2 AMR 1489, SC (distd)

Mohd Salleh bin Kassim v Taisho Marine & Fire Insurance Co Ltd & Anor [1999] 5 CLJ 302, HC (distd)

Pendaftar Pemeriksa Kereta-Kereta Motor Melaka & Ors v KS South Motor Sdn Bhd [2000] 2 MLJ 540; [2000] 2 CLJ 573 (not folld)

People's Insurance Co (M) Sdn Bhd, The v Syarikat Kenderaan Melayu Kelantan Bhd [2001] 2 AMR 1593, HC (refd)

Rafiah bte Bakar v East West-UMI Insurance Bhd [1993] 1 MLJ 39, HC (refd)

Shambu Nath Mehra v The State of Ajmer [1956] SCR 199, SC (refd)

Tajjul Arifin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143; [1993] 3 CLJ 117, SC (refd)

Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668; [1996] 2 CLJ 270, CA (not folld)

Legislation referred to

Evidence Act 1950 ss 90A, 90A(2), (3), 103, 106
Road Transport Act 1987 ss 61(1), 91, 91(4), 96(1), (3), 98(1)
Rules of the High Court 1980 O14

NT Vello (Ravin Vello with him) (Vello & Associates) for the appellant.
E Gnasegaran (E Gnasegaran & Co) for the respondent.

Zakaria Sam J:

BACKGROUND

[1] The claim by the respondent/plaintiff (hereinafter to be referred to as the respondent in this appeal) was brought as a result of an accident which happened on 3 November 1996, involving a motorvan bearing registration

No PAA 8848 ('motorvan') and motorcycle bearing registration No PU 5604 ('motorcycle'). The rider of the said motorcycle died in the accident.

[2] On 1 April 1997, the respondent who is the mother of the deceased rider of the said motorcycle, instituted proceedings against the owner and driver of the said motorvan in Parit Buntar Magistrate's Court vide Summons No 73–23 of 1997 ('the first action').

[3] Prior to the filing of the first action, the respondent's solicitors obtained a letter dated 3 March 1997 from the Jabatan Pengangkutan Jalan, Pulau Pinang ('JPJ') (exh P5) which revealed that the Insurance Company of North America (predecessor of the appellant company) was alleged to have issued a cover note No 11495 ('cover note') in respect of the said motorvan for the period of 17 August 1996 to 16 August 1997.

[4] By a 'without prejudice' letter dated 14 March 1997, the respondent's solicitors wrote to the Insurance Company of North America, forwarding the relevant documents including a copy of the said JPJ letter (exh P5), seeking for an amicable settlement to the matter.

[5] The respondent's solicitors also sent to the appellant a notice under s 96 of the Road Transport Act 1987 ('RTA') (exh P2). The appellant replied informing the respondent's solicitors by a letter dated 4 April 1997 (exh D9) that they were not the insurer of the said motorvan at the material times, as the cover note presented to the JPJ contained five digit numbers whereas the appellant's official cover note had only four digits. By the aforesaid letter, the appellant also informed the respondent's solicitors that they were not liable for any claims arising out of the said accident. The appellant's solicitors further informed the respondent's solicitors by a letter dated 1 June 1998 (exh D13) that the appellant was not at risk and that any attempts to enforce any judgment against them would be resisted.

[6] As the appellant took the stand that they had no liability to meet vis-a-vis the respondent, the appellant's solicitor did not attend the first action in Parit Buntar Magistrate's Court. Be that as it may, the appellant did inform the owner of the said motorvan, H'ng Kheng Guan of the impending action vide letter dated 4 April 1997 (exh D10) and advised him to consult his own lawyers. A similar letter dated 1 October 1997 (exh D12) was also sent to the owner of the said motorvan by the appellant's solicitors.

[7] On 18 November 1997, the Parit Buntar Magistrate's Court recorded a judgment in default against the appellant and on 16 March 1998 the court assessed the damages and gave full judgment to the respondent (exh P1).

[8] The appellant again informed the respondent's solicitors by letter dated 18 May 1998 (see p 95 of the record of appeal) that they were not liable for any judgment obtained. A

[9] On 26 March 1999, the respondent's solicitors filed a recovery action No 72–47 of 1999 (the second action) in the Parit Buntar Magistrate's Court. B

[10] On the instructions of the appellant, the appellants' solicitor filed a defence dated 5 July 1999 resisting the second action.

C

[11] The second action came up for hearing on 22 February 2001 and subsequently on 6 December 2001, the learned magistrate allowed the respondent's claims.

[12] This is the appeal by the appellant in respect of the second action. D

THE RESPONDENT'S CASE

[13] Unmistakably, the respondent based her claims on the basis of the information obtained from the JPJ office vide letter dated 4 February 1992 (exh P5) which stated that the Insurance Company of North America had issued the said cover note. E

[14] At the trial, SP2, the Ketua Unit Rekod at JPJ Pulau Pinang said the insured had obtained a road tax from JPJ. In order to obtain the said road tax the insured had to enclose the said cover note to JPJ office. F

[15] It is the respondent's case that a certificate of insurance (which include cover note as per definition of the RTA) had been delivered to the person insured. As such under s 96(3) of the RTA the appellant is liable to pay the respondent the whole judgment sum and costs. G

[16] In addition thereto, the respondent's solicitors also relied on s 90A of the Evidence Act 1950 to prove their claim. The respondent had through SP2 produced a computer print-out of the registration of the said motorvan (exh P6) and a certificate signed by a senior officer of JPJ, Penang (exh P7) in accordance with s 90A(2) was also tendered to confirm the details of the said motorvan, in particular the ownership of the said vehicle and the named insurer. H I

[17] Having adduced a certificate under s 90A(2) and (3) of the Evidence Act 1950, the respondent claimed that they had conclusively proved that the appellant was the insurer at the material time of the incident and the

evidential burden has shifted to the appellant. It is then incumbent upon the insurer to check and investigate whether the cover note was false or otherwise.

THE APPELLANT'S CASE

[18] SD1, the appellant's claims manager, testified that the appellant never issued the said cover note. The appellant only came to know about the said cover note and the accident (which occurred on 3 November 1996) when they received a letter from the respondent's solicitors (exh P2) on 27 March 1997.

[19] SD1 categorically stated that the said cover note referred to in the JPJ's letter (exh P5) was never issued by the appellant. Their official cover note contained four digit numbers whereas the cover notes mentioned in the JPJ's letter contained five digit numbers. The owner and driver of the said motorvan never informed the appellant about the accident. Upon receiving exh P5, the appellant immediately informed the respondent's solicitors by letter dated 4 April 1997 (exh D9) that they were not the insurer, hence not liable.

[20] It is also pertinent to note that SD1 also lodged a police report (exh D14) disputing the authenticity of the said cover note.

FINDINGS

[21] Under cross-examination, SP2 said the JPJ would not reject any cover note submitted to them. Based on the enclosed cover note, they would issue the requisite road tax. JPJ would then send copies of the cover note to PIAM but not to the insurers.

[22] SP2 further stated that it was not the duty of JPJ to verify the validity of the cover note received. I agree with SP2. If JPJ were to verify the validity of each and every cover note received before issuing a road tax, it would take months for an insured to get his road tax as there are millions of cover notes to be verified.

[23] A cover note is a document issued by the insurer prior to the issuance of an insurance policy. It provides evidence of the existence of insurance coverage for a temporary period. A cover note serves the dual purpose of providing the insured with immediate cover whilst giving the insurer the opportunity to consider and make final decision on whether or not to issue a policy and thereafter if necessary, to prepare the policy.

[24] In normal cases, the owner of the motor vehicle after obtaining the cover note from the insurance company and paying the premium, the owner would sign a proposal form. The cover note is registered with JPJ. A contract of insurance is complete when the proposal is accepted by the insurance company to whom it is made and such acceptance would be communicated to the proposer (ie, the owner).

[25] Exhibit P5 shows the period of insurance coverage ie from 17 August 1996 to 16 August 1997. The accident occurred only on 3 November 1996 and until then, the appellant had not received any proposal form or premium or had knowledge of the alleged cover note.

[26] In my considered opinion, exh P5 merely revealed the particulars of the insurance company according to the unverified record of JPJ that the cover note was issued by the appellant. JPJ accepted the cover note on the assumption that it was genuine and issued the road tax. The burden is therefore on the respondent to prove the validity of the cover note. More so, cover note is only valid for one month, where it would be replaced by a certificate of insurance.

[27] It is useful at this juncture to refer to s 96(1) of the RTA which provides that:

> If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[28] The wordings of this section are clear and unambiguous. To invoke this section, the respondent must prove that the certificate of insurance had been delivered under s 91(4) of the RTA to the person by whom a policy has been affected.

[29] The words 'delivered to the person by whom a policy has been effected' mean, delivered to the owner of the motor vehicle. Therefore, it was for the respondent to call the owner of the said motorvan as a witness to

prove that a certificate of insurance had been delivered to him.

THE BURDEN OF PROOF

[30] Learned counsel for the respondent submitted that since the appellant's case is premised on the averment that the cover note was forged, the burden is on the appellant to prove it. With respect I disagree. He who asserts that he has a valid cover note must prove it, before the burden shift to the appellant.

[31] As to the burden of proof, it is clearly laid out under ss 103 and 106 of the Evidence Act 1950 as follows:

Section 103 provides:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 106 provides:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
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> Illustrations
>
> (a) ...
>
> (b) *A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

[32] In *Shambu Nath Mehra v The State of Ajmer* [1956] SCR 199, it was held by the Supreme Court that:

> That s 106 of the Evidence Act does not abrogate the well-established rule of criminal law that except in very exceptional classes of cases the burden that lies on the prosecution to prove its case never shifts and s 106 is not intended to relieve the prosecution of that burden. On the contrary, it seeks to meet certain exceptional cases where it is impossible or disproportionately difficult for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience.

[33] Although the above is a criminal case the rationale is also applicable to civil cases.

[34] Here the respondent failed:

(i) to produce the cover note or the certificate of insurance;

(ii) to call the insured of the said motorvan to prove that he had purchased the insurance;

(iii) to produce the receipt of payment for the premium; and

(iv) to produce the proposal form.

[35] These shortcomings could easily be circumvented had the respondent's counsel took preemptive action under s 98(1) of the RTA, which states:

> Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 shall, on demand by or on behalf of the person making the claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this Part or would have been so insured if the insurer had not avoided or cancelled the policy and, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance delivered in respect thereof under subsection (4) of section 91.

OTHER ISSUES

[36] The learned magistrate ruled that the appellant should have intervened in the first action. Here, it must be noted that the appellant, indeed, had filed an application to intervene earlier but it was withdrawn later as it was premature for them to do so.

[37] In *Badruzamani bin Azmi v Kurnia Insurance (M) Bhd* [2001] 6 MLJ 481; [2001] 4 AMR 4040, it was held that:

> Any dispute between the insurers and the plaintiffs pertaining to the insurers statutory liability will only come about after the judgment has been entered. Without such a judgment the insurer ie the respondent in this instant case, would seem to have 'jumped the gun' and had filed a premature application to intervene.

[38] Applying the principles as enunciated in the above case, the appellant therefore could not have intervened in the respondent's first action as their interest was merely contingent and not vested.

[39] The learned magistrate also remarked that the appellant could have applied to join as a co-defendant in the first action. But in *Carpenter v Ebblewhite* [1939] 1 KB 347, the English Court of Appeal held that an insurer will not be allowed to be added a co-defendant where the action for negligence is against the driver or the owner of the car insured. The reason for that decision is that, if such an application was made, the respondent would refuse to plead negligence against the intended co-defendant. Under such a

A situation, the intended co-defendant could apply for the suit, so far as it involved them, to be struck off as it disclosed no cause of action (see also *Tajjul Arifin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143; [1993] 3 CLJ 117).

B **[40]** Therefore it is clear that the appellant company were not in a position either to intervene or made a co-defendant.

[41] The learned magistrate then referred to the Court of Appeal case of C *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668; [1996] 2 CLJ 270 to support his view that the appellant should have intervened or applied to be made a party to the process. However, this case is not applicable to the facts of the instant case as it was not a runner case and no insurance company was involved.

D **[42]** The learned magistrate further ruled that the appellant did not give sufficient particulars of fraud.

E **[43]** In their defence pursuant to the recovery action, the appellant company had pleaded that the alleged cover note was not issued by them and was false. No policy or certificate of insurance was ever issued by them. The owner of the said motorvan never informed the appellant of the cover note or of the accident, therefore, it was not possible for the appellant to produce F any documentations or particulars of fraud. How could the appellant produce any record or document when they did not have any file or record of the said motorvan. There was no proposal form nor proof of premiums paid, tendered in court. The appellant therefore could not be said to have concealed any evidence from the court. They could not have pleaded anything more than G this. They could not plead fraud against a party who was not a party in the recovery proceedings.

[44] The learned magistrate then referred to the following cases: In *Rafiah bte Bakar v East West-UMI Insurance Bhd* [1993] 1 MLJ 39, there was a valid H insurance policy and the respondent sought to enforce a judgment that had been obtained against the insured. The insurance company contended that they had a right to set-off against the respondent's judgment sum. Such a claim or contention was dismissed. Therefore the facts are distinguishable.

I **[45]** In *The People's Insurance Co (M) Sdn Bhd v Syarikat Kenderaan Melayu Kelantan Bhd* [2001] 2 AMR 1593, the respondent obtained a judgment against the insured and claimed against the insurance company for loss of property and the court had to decide whether the claim was outside the ambit of s 96(1) of the RTA. There was a valid certificate of insurance delivered to

the insured. In this instant appeal there was no evidence that a certificate of insurance was ever delivered to the owner of the vehicle by the appellant. A

[46] In *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165; [1997] 2 AMR 1489, the insured had a valid compulsory third party motor insurance policy issued by the appellant insurer. Insurance policy was in full force on the date of accident. The facts of that case are not relevant to our case and therefore distinguishable. B

[47] In resisting the respondent's claim for recovery of the sum, the appellant's counsel referred to the case *Capital Insurance Bhd v Kasim bin Mohd Ali* [1996] 2 MLJ 425. In that case, the respondent obtained judgment against the driver and owner of a motor vehicle which knocked into him. When the judgment could not be enforced against the driver and owner, the respondent filed a recovery action against the appellant as the insurers of the motor vehicle. It was the appellant's defence that it never issued or delivered a certificate of insurance to the owner of the motor vehicle. The respondent contended otherwise and produced a letter written by the Selangor RIMV which stated that the appellant has issued a policy to the owner. The High Court judge accepted the RIMV letter as evidence and gave judgment (by way of O 14) to the respondent. The appellant appealed. Siti Norma Yaakob JCA (as Her Ladyship then was) on behalf of the Court of Appeal held that: C D E

> The respondent's cause of action against the appellant is founded under s 96(1) of the Road Transport Act 1987 under which an insurer is duty bound to satisfy any judgment obtained against any person insured by the insurer in respect of third party risks. However, the liability to satisfy such judgment is conditional upon the insurer having delivered a certificate of insurance under s 91(4) of the same Act to the person by whom the policy has been effected. It is the appellant's defence that it never issued or delivered a certificate of insurance to the owner of the motor vehicle that collided into the respondent. F G
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> The respondent's reply to this is that such a certificate was issued as is evidence by a letter written by the Registrar and Inspector of Motor Vehicles, Selangor ('RIMV') dated 2 March 1988 to the respondent's solicitors in answer to the latter's enquiry as to the status of the motor vehicle. Section 96(1) speaks of the delivery of a certificate of insurance by an insurance company to the insured as a precondition before liability can be pinned against the insurers. The certificate must therefore be issued and delivered by the appellant to the insured and not by anybody else. The letter from the RIMV does not fulfill the requirements of s 96(1). H I
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> On the face of it, it merely states that the appellant had issued a policy to the owner of the motor vehicle, BBQ 7196 to cover the period from 17 October 1985 to 16 October 1986. The policy may well have been issued by the appellant, but the letter from the RIMV is not evidence of any delivery of a certificate of insurance by the appellant to the insured as required by s 96(1). To regard that it did as did

A the trial judge is totally erroneous. The letter from the RIMV is not the certificate that is envisaged by s 96(1). The certificate has never been produced by the respondent and the appellant has denied delivering one to the insured person.

B **[48]** The facts in the above case are on all fours with the instant appeal. Even so, the learned magistrate did not apply the principles on the ground that the respondent's appeal to the Federal Court was allowed. The learned magistrate here failed to appreciate that the appeal was allowed on technical grounds which were unrelated to the issue of delivery of a certificate of insurance (see *Asiah bt Abdul Manap & Anor v Capital Insurance Bhd* [1998] C 4 MLJ 361 (where *Asiah bt Abd Manap* herein replaced the deceased Kasim bin Mohd Ali). Notwithstanding the case was sent back to the Court of Appeal to be reheard, it must be remembered that the ruling by Siti Norma Yaakob JCA pertaining to her finding on the issue of the delivery of a certificate of insurance under s 61(1) of the RTA was not disturbed by the D Federal Court.

[49] In *Capital Insurance Bhd v Kasim bin Mohd Ali* [2000] 1 MLJ 193; [2000] 1 CLJ 269, the new panel of Court of Appeal had dismissed the insurers appeal on the grounds that the appeal record was not in compliance E with the Rules of the Court of Appeal. Again, the Court of Appeal here made no ruling on the issue of the delivery of the certificate of insurance.

[50] As this issue was not disturbed by the new panel of the Court of F Appeal, clearly the ruling by Siti Norma Yaakob JCA must still be binding.

[51] In this context, the case of *Malaysia National Insurance Sdn Bhd v Lim Tiok* would also be illustrative. Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court, referred to Lord Denning's dissenting G judgment in *Harker v Caledonian Insurance* [1979] 2 Lloyd's Rep 193. The ruling was in relation to similar provisions as our s 96(1) of the RTA. This case came up on appeal to the House of Lords where Lord Denning's said ruling in the dissenting judgment remained untouched. Edgar Joseph Jr FCJ had this to say:

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> It is true that in *Harker*'s case, Lord Denning wrote the dissenting judgment but neither the judges who constituted the majority in the Court of Appeal nor Lord Diplock who spoke for the House of Lords when the matter went on further appeal ([1980] 1 Lloyd's Rep 556) disapproved of the above passages in Lord Denning's judgment... Lord Denning's reasoning reflected in the above extracts from his I judgment was left untouched and is, therefore, of assistance in deciding the present case, bearing in mind that the relevant provisions of the English statute and our statute are in pari materia.

[52] The respondent's counsel referred to the case of *Mohd Salleh bin Kassim v Taisho Marine & Fire Insurance Co Ltd & Anor* [1999] 5 CLJ 302, to support their argument that the burden to prove fraud is on the appellant. In this case, three searches with ROV revealed, at the material time, that motorcycle No AY 7181 X was registered in the name of Ding and that Taisho was the insurer. All these were also incorporated in the statement of agreed fact and there was also a proposal form signed by one Mr Tan. There was no oral evidence emanating from Taisho to deny that they did in fact issue the policy of insurance to Ding. Taisho had by letter dated 8 January 1985 admitted that they were the insurer of the said motorcycle.

[53] In the instant appeal, the facts are distinguishable. It is the appellant's case from the inception that they never issued the said cover note.

[54] Learned counsel for the respondent further relied on the decision of Siti Norma Yaakob JCA (as Her Ladyship then was) in the case of *Pendaftar Pemeriksa Kereta-Kereta Motor Melaka & Ors v KS South Motor Sdn Bhd* [2000] 2 MLJ 540; [2000] 2 CLJ 573, where it was explained that:

> We also consider that every particular information recorded in the files of a registered vehicle is a representation that such information is accurate and reliable as the paying public particularly owners of motor vehicles, would be purchasers of such vehicles and those involved in the motor trade like the respondent, rely on such information to conduct private and commercial transactions. It is this concept of general reliance that imposes a duty on the first and second appellants to take care that all information coming from them are accurate.

[55] The above case, essentially, pointed out that the duty of JPJ is to keep a proper and accurate of their register and not on the application of s 91 of the RTA. The above authority, therefore, is not relevant to the appeal before me.

CONCLUSION

[56] For all the reasons stated above, I allow the appeal with costs.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed